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MAICA Corp Sdn Bhd & Ors v Bina Satu Sdn Bhd (Abdul Karim bin Ibrahim, contributory and I & P Supply Sdn Bhd & Anor, first and second intervenor)

B HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D8–28–930 OF 2000
ABDUL WAHAB J
6 JUNE 2006

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Company Law — Liquidation — Proof of Debts — Admission of debts against the company wound up by court order — Legal position in respect of proof of debts in liquidation — Procedure for Proof of Debt — Whether liquidator under a duty to examine each and every proof of debts — Whether Liquidator ought to exercise discretion D *judiciously, reasonably and with proper basis — Companies Act 1965, s 291(1) and Winding-up Rules, r 78 to r 10*

I & P Supply Sdn Bhd ('the first intervenor') has filed an application under r 93 of E the Companies (Winding Up) Rules 1972 for an order that the official receiver's decision, as liquidator for the respondent, in rejecting the first proof of debt for RM3,534,073.54 and the second proof of debt for RM32,723.13 of the first intervenor be reversed. The official receiver after having received all the relevant documents in respect of the first and second proof of debt rejected the claim for several reasons. Firstly, because there was no original copy of the purchase order from F the respondent; secondly, there was no original copy of the delivery order; thirdly, because of the presence of contradictions in the documents tendered and fourthly, lack of clarity among others. The first intervenor contended that there was no justification in the liquidator's ground in rejecting the proof of debt, for there were 'no original documents provided'. While not denying that not all the original G documents were produced, the first intervenor, gave the reasons namely, that the original documents had been destroyed in a fire.

Held, official receiver ordered to accept the proof of debts:

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(1) A liquidator is under a duty to examine each and every proof of debt filed. He may then admit or reject, in whole or in part, the proof in writing or require further proof in support. The law is that the liquidator is under a statutory duty to examine each and every proof filed (see paras 17 & 19).

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(2) Hence, the liquidator should have taken into consideration the fact that; firstly, all proof of debts are affirmed on oath, secondly, the destruction of the originals by fire is not a mere allegation since the first intervenor had explained by way of contemporaneous documents to support this, and thirdly, there is no reason to believe that the copies of the purchase orders made are not accurate reproductions of the original (see para 21).

(3) Clearly, the contradictions alleged by the liquidator, even if true only affected a very small fraction of the proof of debt. However, the liquidator rejected the proof of debts in totality. By virtue of the law and principles that govern the admission of proof of debts, it was wrong for the liquidator to reject the proof of debts in its totality. Just because not all the original documents could be produced, the proof of debts should not be automatically rejected (see para 21).

[Bahasa Malaysia summary

I & P Supply Sdn Bhd ('pencelah pertama') telah memfailkan permohonan di bawah k 93 Kaedah (Penggulungan) Syarikat 1972 bagi suatu perintah bahawa keputusan pegawai penerima, selaku penyelesai bagi responden, menolak pembuktian hutang pertama sejumlah RM3,534,073.54 dan mengakas pembuktian hutang kedua sejumlah RM32,723.13 masing-masing kepunyaan pencelah pertama. Pegawai penerima setelah menerima semua dokumen relevan terhadap pembuktian hutang pertama dan kedua menolak tuntutan atas beberapa alasan. Pertama, kerana tidak terdapat salinan asal perintah pembelian daripada responden; kedua tidak terdapat salinan asal perintah hantar-serah, ketiga kerana wujud percanggahan di dalam dokumen-dokumen yang dikemukakan dan keempat, ianya kurang jelas, antara lain. Pencelah pertama menghujahkan bahawa tidak ada justifikasi di dalam alasan penyelesai menolak pembuktian hutang atas sebab 'tiada dokumen asal dikemukakan'. Sementara tidak menafikan bahawa bukan semua dokumen asal dikemukakan, pencelah pertama telah mengemukakan alasan, iaitu, dokumen asal telah musnah di dalam suatu kebakaran.

Diputuskan, pegawai penerima diarah menerima pembuktian hutang:

(1) Penyelesai adalah bertanggungjawab untuk menilai setiap dan kesemua pembuktian hutang yang difailkan. Setelah itu, beliau boleh menerima atau menolak, keseluruhan atau sebahagian pembuktian bertulis atau meminta pembuktian lain sebagai sokongan. Undang-undang memperuntukkan bahawa penyelesai mempunyai kewajipan statutori untuk menilai setiap dan kesemua pembuktian yang difailkan (lihat perenggan 17 & 19).

(2) Oleh itu, penyelesai sepatutnya telah mengambil kira fakta-fakta iaitu, pertama, semua pembuktian adalah diikrarkan atas sumpah, kedua, kemusnahan dokumen asal dalam kebakaran bukanlah pengataan semata-mata memandangkan pencelah pertama telah menerangkannya melalui pembuktian dokumen-dokumen terkini dan ketiga, tidak terdapat alasan untuk mempercayai bahawa salinan perintah pembelian dibuat adalah tidak selari dengan pengemukaan asal (lihat perenggan 21).

(3) Jelasnya, kontradiksi yang dihujahkan penyelesai, jika pun benar, cumalah mengenai sebahagian kecil bahagian pembuktian hutang. Walau bagaimanapun, penyelesai menolak keseluruhan pembuktian hutang. Mengikut prinsip undang-undang dan amalan yang mengawal penerimaan pembuktian hutang adalah salah bagi penyelesai menolak keseluruhan

A pembuktian hutang. Hanya atas sebab yang bukan kesemua dokumen asal dapat dikemukakan, pembuktian hutang tidak seharusnya ditolak secara automatik (lihat perenggan 21).]

Notes

B For cases on proof of debts, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 368–371.

Cases referred to

Re Contract Corporation Gooch's case [1872] 7 Ch App 207 (refd)
C *Re Byron, Ex p Boler digest* Vol 5(1) para 9868 (refd)
Re Home and Colonial Insurance Company Ltd [1930] 1 Ch 102 (refd)
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram [1995] 2 MLJ 709 (refd)

Legislation referred to
D Companies Act 1965 s 291(1)

S Chandran (Vijayan Chandran & Partners) for the contributory.
WM Chang (Raja Darryl & Loh) for the first & second intervenors.

E **Abdul Wahab J:**

[1] I & P Supply Sdn Bhd ('the First Intervenor') has filed an application under r 93 of the Companies Winding Up Rules (encl 65) for an order that the oficial
F rceiver's decision, as liquidator for the respondent in rejecting the first intervenor's first proof of debt for RM3,534,073.54 and the second proof of debt for RM32,723.13 be reversed.

[2] The respondent was appointed as main contractor in respect of two projects.
G The first project was by Peninsular Land Development Sdn Bhd by way of contract dated 6 February 1998 ('the First Project'). The second project was by Perumahan Kinrara Bhd by way of a contract dated 5 May 1997.

[3] Under both contracts, the respondent was obliged to purchase certain construction materials for both projects from the first intervenor who sourced the
H material from third party supplier. Materials were delivered to respondent at respective project site by the third arty supplier. Original delivery orders which were signed by respondent were then sent to the first intervenor who would issue the invoices to the respondent accordingly.

I **[4]** As for the first proof of debt, the first intervenor had claimed for RM3,534,073.54 for building materials supplied under the first project. The respondent supplied to the liquidator in respect of this first proof of debt the following documents:

(1) Reprinted copies of purchase order and invoice

(2) Original delivery order

(3) Statement of accounts in respect of 433 sales transaction

[5] The second proof of debt of RM32,723.13 consists of materials supplied to the respondent in respect of the second project. For this second proof of debt, the liquidator again supplied with:

(1) Reprinted copy of purchase order and invoices

(2) Original delivery order

(3) Statement of accounts in respect of 21 sales transaction

[6] I had earlier granted encl 28 on 31 March 2004 which ordered the official receiver as liquidator to reconsider the first proof of debt upon submission of further documents. There the liquidator had by letter dated 10 June 2003 requested the first intervenor for further documents to consider proof of debts. First Intervenor had alleged that the letter which did not specify a time frame was received by them only on 20 June 2003. However, four days later on 24 June 2004 the liquidator faxed a copy of letter of rejection on the first intervenor. The official receiver however having received all the documents yet rejected the first proof of debt on 29 April 2005.

[7] The official receiver's reasons for rejecting the first proof of debt are:

(1) Firstly, there is no original copy of the purchase order from the respondent.

(2) Secondly, there is no original copy of the delivery order.

(3) Thirdly, the contributory of the respondent has given photostat copies of the delivery orders from the first intervenor where the serial numbers of the delivery orders are the same but with different signatures.

(4) Fourthly, the official receiver has asked the first intervenor to supply the original purchase orders during the general meeting but the first ntervenor has failed to supply them.

(5) Fifthly, the contributory of the respondent has sent photostat copies of the delivery to a third party by the first intervenor but was charged to the respondent's account.

[8] As for the second proof of debt, the official receiver's reasons are:

(1) Firstly, there is no original copy of the purchase order from the respondent.

(2) Secondly, there is no original copy of the delivery order.

(3) Thirdly, all documents in support were photostat copies.

(4) Fourthly, the contributory of the respondent has sent a copy of the statement of final accounts sent by Perumahan Kinrara Berhad where it was stated that no claims were deducted from the costs to be paid to the first intervenor.

(5) Fifthly, if the respondent really owed the first intervenor, the debt should be deducted through the final account through a column called 'Deduction' No 3:

A Direct payments made to nominated suppliers. This is because the first intervenor is a nominated supplier for the housing project.

[9] The first intervenor in its submissions said that the liquidator was wrong in rejecting the proof of debts. It was stressed that although the liquidator has the B discretion to admit or reject any proof of debt, such discretion must be exercised judiciously, reasonably and with proper basis.

[10] As for the liquidator's ground that no original documents were provided, the first intervenor said that it is not disputing that there are no purchase orders from the C respondent, the reason being the original purchase orders to suppliers and the invoices have been destroyed in a fire. However, original delivery orders had been supplied to the liquidator. The first intervenor contended that all directions given by the liquidator at a meeting on 9 September 2004 had been complied with.

D **[11]** The first intervenor said that the liquidator was wrong to take the stand that the proof will be automatically rejected because not all the original documents were produced. This is because all proof of Debts are affirmed under oath and the destruction of the originals by fire had been explained by way of contemporaneous documents and there is no reason on the part of the liquidator to believe that the E reprinted copies of the purchase orders made are not accurate reproductions of the original. The first intervenor recalled that the liquidator was informed that the originals were destroyed but printed copies can be reproduced. The liquidator directed that reprinted copies be submitted and the first intervenor did submit the reprinted copies. Despite that, the liquidator still rejected the documents on the grounds that they were not the originals.

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[12] The first intervenor submitted that the delivery orders that it had produced showed that the materials were delivered to the site for the use of the respondent. The respondent had acknowledged receipt of the goods and the first intervenor then issued invoices to the respondent. The first intervenor said that if there are any G questions, it would relate only to the quantum since the respondent in its affidavit had admitted using the materials and its dispute is as regards to only a small number of invoices.

[13] The first intervenor said that the alleged contradictions and lack of clarity in H some of the documents do not justify a total rejection of the proof of debts. The first intervenor questioned the total rejection saying that the respondent possesses copies of the delivery order, signifying that it did infact receive the materials.

[14] As for the second proof of debt, the first intervenor adopts the earlier I submissions on the alleged lack of original documents. In respect of set-off in the second project's final account, the first intervenor said that the final account shows that the developer did not make any direct payment to the first intervenor. Had the developer paid the first intervenor and deducted it from the respondent, the first intervenor would not have filed this second proof of debts. The first rntervenor said that the respondent was actually credited with the full contract price and no sum was

deducted in respect of the supply of materials. It was highlighted that there were two independent and separate contracts between the employer and the respondent and between the respondent and the first intervenor.

[15] The Federal Counsel appearing for the official receiver did not make any submission. She only said in one breath that the grounds of rejection of the proof of debts were in order. Her indifference is appalling. After listening to lengthy submissions from the first intervenor to which the Federal Counsel again said she had nothing to say in reply, I allowed the respondent's application as regards the first proof of debt (proof of debt No 2) to the extent of RM3,425,345.33 and the second proof of debt (proof of debt No 3) to the extent of RM27,289.61. My reasons are as follows.

[16] The law and principles that govern the admission of debts against a company wound up by the court is s 291(1) of the Companies Act 1965 ('The Act'). It says:

> in every winding up … all debts payable on a contingency and all claims against the company present or future certain or contingent ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims…

[17] Where the procedure for proof of debts is concerned, it is provided in rules 78 to 100 of the Winding Up Rules. In r 92 it is provided that the liquidator is under a duty to examine each and every proof of debt filed. The liquidator may then admit or reject, in whole or in part the proof in writing or require further proof in support.

[18] The case of Re Byron, Ex p Boler digest Vol 5(1) para 9868 aptly summarises the legal position in respect of proof of debts in liquidation. It was held that

> A creditor is entitled to have his proof admitted upon oath unless there be adverse evidence, or surrounding circumstances rendering it improper to admit it

[19] It is the duty of a liquidator to examine each and every proof of debt. This was discussed by Maugham J in *re Home and Colonial Insurance Company Limited* [1930] 1 Ch 102

> The Winding-Up Rules recognise that the liquidator, who has to examine every proof of debt lodged with him and the grounds of the debt, may be wrong; and provision is made for an appeal to the court, who may reverse or vary the liquidator's decision. The claim of the creditor may be based upon disputable matters of fact, as well as difficult questions of law … I think there can be no doubt that, in the circumstances of the case, a high standard of care and diligence is required from a liquidator in a voluntary winding-up … I have come to the conclusion that having regard to the magnitude of the claim, in addition to the considerations I have mentioned, it was the duty of the liquidator carefully to investigate the validity of the proof put in by the London Guarantee Company …

[20] In dealing with proof of debt, the liquidator acts in a quasi judicial capacity. Appeal to the judge appears to be by rehearing and either party is entitled to adduce

A fresh evidences in support of its stance. The function of the liquidator changes in circumstances where a creditor appeals against his decision where the liquidator will have to defend the decision made to reject the proof of debt. Going back to the Companies Winding-Up Rules, the court's power to review the correctness of the liquidator's decisions includes approaching the matter afresh and to admit or reject B the proofs of debt or vary the liquidator's decision. The court will have to consider evidence in support of the creditor's proof of debt.

[21] By virtue of the Law and Principles that govern the admission of proof of debts, I hold that it was wrong for the liquidator to reject the proof of debts in its C totality. Just because not all the original documents could be produced, the proof of debts should not be automatically rejected. The liquidator should have taken into consideration the fact that:

(1) Firstly, all proof of debts are affirmed on oath;

D (2) Secondly, the destruction of the originals by fire is not a mere allegation since the first intervenor furnished some documents to support this.

(3) Thirdly, there is no reason to believe that the copies of the purchase orders made are not accurate reproductions of the original.

E **[22]** During a meeting with the liquidator, the first intervenor informed the liquidator that it is not possible to produce the originals of some of the documents, ie the original purchase orders to suppliers and the invoices since they have been destroyed in a fire. Upon hearing this, the liquidator, who at first wanted originals, directed reprinted copies to be submitted. However, after the first intervenor F submitted reprinted copies, the liquidator rejected the proof of Debts on the ground that they were not original documents. The stand taken by the liquidator is to put it mildly, somewhat baffling. This is in view of the fact that the liquidator had earlier taken the stand that it is alright to produce reprinted copies and that it already had original copies of the delivery orders in its possession. The liquidator had also not alleged that these copies are forged or had been tampered with. G

[23] In view of the above, I hold that there is no justification in the liquidator's first ground in rejecting the proof of debts ie 'no original documents provided'.

H **[24]** As for 'Contradictions in Documents and Lack of Clarity', the second and third ground for rejection of the proof of debts, I find that even if these reasons are valid, it does not justify a total rejection of the proof of debts.

[25] Firstly, regarding the discrepancy pointed out by the contributory that the signatures in some of the delivery orders do not match, this only affects delivery I orders worth RM33,453.60 in respect of 12 sales transaction.

[26] Secondly, regarding the allegation by the contributory that certain delivery orders delivered are in respect of goods delivered to third parties, it is noted that the proof of debt does not make any claim with respect to such goods.

[27] Thirdly, the allegation that certain delivery orders cannot be clearly read, covers only a small portion of the claim for a sum RM58,994.95 whilst some of it are in fact readable. Original copies of these delivery orders have been filed with the liquidator and have been exhibited as exhibits filed herein. As such it is not difficult to compare and read the clear copies made available.

[28] Clearly, the contradictions alleged by the liquidator, even if true, only affects a very small fraction of the first proof of debts. However, the liquidator rejected the proof of debts in totality. The law is that the liquidator is under a statutory duty to examine each and every proof file. In *re Contract Corporation, Gooch's* case [1872] 7 CH App 207 referred to by the Federal Court in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram* [1995] 2 MLJ 709, Sir James LJ held that:

> It is of the utmost importance that the liquidator should, as the officer of the Court, maintain an even and impartial hand between all individuals whose interests are involved in the winding-up. He should have no leaning for or against any individual whatsoever. It is his duty to the whole body of shareholders, and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company … And it is for the Judge to see that he does his duty in this respect.

[29] Premised on the above reasons, I ordered the official receiver to accept the first proof of debt (proof of debt No 2) to the extent of RM3,425,345.33 after deducting the amount of RM108,728.21 from the amount stated in the proof of debt. The latter is the disputed amount of which the supporting documents are either inconsistent or unclear and hard to read as stated in the official receiver's 'Notis Penolakan Borang Bukti Hutang No 2.' The deduction comprised of disputed delivery orders with different signature as given by contributory to liquidator amounting to $39,390.65 and the unclear copies in Jilid 1, Jilid 3, Jilid 4 and Jilid 5 for a total of 25 transactions with a value of RM69,337.36. As regards the second proof of debt (proof of debt No 3), I ordered the official receiver to accept RM27,289.61 for 19 transactions that had complete documentation after deducting the amount of RM5,433.52 for item 3 and 4 which had not been substantiated by complete documentation as stated in the official receiver's 'Notis Penolakan Bukti Hutang No 3.'

Official receiver ordered to accept the proof of debts.

Reported by Ashgar Ali Ali Mohamed